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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-521

ROGERS C. B. MORTON, Secretary of the Interior,
Petitioner,

v.

DELTA MINING, INC., G. M. & W. COAL COMPANY, INC., AND EDWARD MEARS ET AL. d/b/a M. Y. COAL COMPANY,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE FOR THE UNITED MINE WORKERS OF AMERICA

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INTRODUCTION

The United Mine Workers of America presents this brief in support of the petitioner with the consent of counsel for both the petitioner and the respondents.

INTEREST OF AMICUS

The United Mine Workers of America is a labor union representing over 120,000 coal miners in 23 states. As such,

the UMWA is the collective bargaining representative of the great majority of the nation's coal miners, and is their chief spokesman in matters in.olving their health and safety. The UMWA is therefore extremely interested in strong and effective enforcement of the Federal Coal Mine Health and Safety Act of 1969, which was enacted for the purpose of protecting the health and safety of the nation's coal miners.

ARGUMENT

The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 *et seq.*, became law on December 30, 1969. A monument to 78 coal miners needlessly killed in the 1968 explosion of Consolidation Coal Company's Mountaineer No. 9 Mine at Farmington, West Virginia,[1] and to the more than 100,000 American coal miners who have been killed in coal mines during our nation's history, the Act declared that "the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner." Section 2(a), 30 U.S.C. §801(a). Congress found that there was "an urgent need to provide more effective means and measures for improving the working conditions and practices in the nation's coal mines in order to prevent death and serious physical harm." Section 2(c), 30 U.S.C. §801(c).

Congress sought to curb the slaughter in the nation's coal mines by requiring coal mine operators to observe a number of mandatory health and safety standards. Interim standards were included in Titles II and III of the Act itself, 30 U.S.C. §§841-878, while Section 101 of the Act (30 U.S.C. §811) set up procedures for administrative promulgation of improved standards in the future. Federal inspectors were granted the right to enter and inspect all coal mines, and required to do so at least four times per year.

[1] As distinguished from the 1954 explosion at the same mine, which killed 16.

Section 103, 30 U.S.C. §813. The inspectors were ordered to close mines or areas of mines in certain circumstances. Section 104, 30 U.S.C. §814. And to deter operators from violating the Act and the mandatory safety standards, the Secretary was ordered to assess civil fines for all violations that his inspectors found. Section 109, 30 U.S.C. §819.

The history of the civil penalty provisions of Section 109 is not an impressive one. Put simply, the administration of the penalty provisions has been an unmitigated disaster, with relatively few of the required penalties ever having been collected.[2] The overwhelming number of unsafe and unlawful practices in the nation's mines (over 80,000 found per year), together with the apparent unwillingness of many coal operators to obey the law, has placed an impossible burden upon an Interior Department that is relatively understaffed compared to the massive number of violations with which it must deal. As a result, huge numbers of violations are repeated over and over again, undeterred by the statutory penalty scheme.

The Court of Appeals has now interpreted the Act's penalty provisions in a manner that will require reprocessing of an estimated 24,000 individual penalty assessments from past years, and that may substantially affect the Department's ability to deal summarily with small, uncontested assessments in the future. This is hardly desirable, and is wholly unnecessary. Amicus submits that the Court of Appeals misinterpreted the statute, and that its decision should therefore be reversed. Further, even if this Court were to adopt the Court of Appeals' interpretation, this Court's decision need not be so sweeping as that of the Court of Appeals' and consequently need not place so great a burden upon the Interior Department's enforcement mechanisms.

[2] See, *e.g.*, "Enforcement of Federal Mine Health and Safety Laws," Hearing Before a Subcommittee of the Committee on Government Operations, House of Representatives, 93d Congress, 1st Sess. (Oct. 31, 1973).

I. THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED.

The UMWA believes that Judge MacKinnon's opinion in the companion case, No. 73-2066, and particularly his discussion of the legislative history of the penalty provisions, amply demonstrate why the Third Circuit's interpretation of the penalty provisions in this case is erroneous. In support of that discussion, the UMWA would add only that the District of Columbia Circuit's interpretation of the statute is the same as that of the Secretary of the Interior, and that this Court has frequently observed that where "the officers or agencies charged with administration" of a statute have interpreted it, the courts are to "show . . . deference to [that] interpretation." *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). A court "need not find" that the administrative officer's interpretation "is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings. . . ." *Unemployment Commission of Alaska* v. *Aragon,* 329 U.S. 143, 153 (1946). "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'." *Power Reactor Development Co.* v. *IUE,* 367 U.S. 396, 408 (1961).

It is also important, however, that this Court be aware that it need not even reach the statutory interpretation question. For the Court of Appeals' decision should be reversed because the respondents failed to exhaust their administrative remedies and, in addition, because they have a right to de novo reconsideration of the penalties assessed against them in federal district court.

When the respondents decided to allow the Assessment Officers' proposed orders to become final without further protest, *they knew* that they were thereby waiving *both* a

hearing *and* a decision incorporating complete findings of fact. They had been so informed by regulations published in the Federal Register, and by direct communications sent to them by the Assessment Officers. At that point, they could have taken a number of different steps that would have informed the Interior Department of their objections to the form of the Assessment Officers' orders, and would have allowed the Department to consider their objections administratively before their cases reached federal court. But the respondents did nothing of the kind. Instead, they just sat mute, choosing to wait and spring their objections on the Department only after the assessments against them had wound their way over to the Justice Department and into federal district court, and only after the Department had made additional thousands of assessments under the procedures the respondents presumably intended to challenge all along.

Rather than rolling over and playing dead, the respondents could have taken any one of several possible steps upon receipt of the Assessment Officers' orders. They could, for example, have requested the Assessment Officers to reconsider their orders or the form of their orders, pointing out that respondents believed that such orders had to contain more complete findings of fact. Or they could have filed administrative appeals, noting that while hearings were not desired, formal findings of fact were, and further noting that the respondents believed that they were entitled to findings of fact even in the absence of a hearing. Or, finally and most importantly, the respondents could have requested that the Department indeed hold hearings, while at the same time advising the Department that they did not wish to appear. They would thereby have required Interior's enforcement branch to present its cases *ex parte* to Administrative Law Judges for de novo review and preparation of complete findings of fact, even though they themselves did not intend to be at the hearings.

Although this last procedure may sound a bit odd, it is precisely the same procedure that the petitioner in the companion case, No. 73-2066, would require for all penalty assessments whether requested or not.[3] In fact, Interior Department Administrative Law Judges have held hundreds of such proceedings each year under the regulations. A request for a hearing is all that is necessary to put the enforcement branch to its burden of proof in a de novo administrative penalty review proceeding from which complete findings of fact will emerge, and an operator's failure to appear at a requested hearing is in no way considered to be a surrender by the operator.[4] Thus, all the respondents had to do to obtain complete findings of fact was to file a request for a hearing, a hearing they were perfectly free not to attend!

In addition, the UMWA would reiterate the general rule that procedural defects at one level of a proceeding are not fatal where de novo review is available at another level. *Pittsburgh S.S. Co.* v. *Brown,* 171 F.2d 175, 178 (C.A. 7, 1948), and *Jordan* v. *American Eagle Fire Insurance Co.,* 169 F.2d 281, 290 (C.A.D.C., 1948); *cf. Colten* v. *Kentucky,* 407 U.S. 104, 112-19 (1972). The Court of Appeals held that the assessment orders here were invalid because they did not contain findings of fact as to the six statutory assessment criteria. Yet under Section 109(a)(4) of the Act, 30 U.S.C. §819(a)(4), the district court was required to "consider and determine de novo all relevant issues" before the Secretary's assessment orders could be enforced.

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[3] See p. 8, *infra.*

[4] The Court of Appeals attempted to distinguish the cases presented to it from the one presented to the District of Columbia Circuit by asserting that the respondents here may have chosen to waive a hearing and findings of fact because they did not wish to go to the expense and inconvenience of attending a formal hearing. 495 F.2d at 44. But since such attendance is unnecessary, the only "expenses" and "inconveniences" that would have actually been required were those of filing a simple notice of appeal.

II. IF THE DECISION OF THE COURT OF APPEALS IS NOT REVERSED, THIS COURT SHOULD NARROW THE SCOPE OF THE REMEDIAL ACTION REQUIRED.

If this Court should determine that the Court of Appeals' interpretation of the statutory penalty provisions is correct, its decision need not place as great a burden upon the Interior Department as would result from simple affirmance. The Court of Appeals partially misunderstood the nature of the Secretary's final assessment orders in the instant case, and for that reason its decision is broader than is necessary to effectuate its interpretation of the statute.

The Court of Appeals believed that "[t]he final orders entered [here] by the Secretary did not mention the six statutory [assessment] criteria at all, but merely set forth the Secretary's finding that a violation 'did, in fact, occur.'" 495 F.2d at 40. However, the Secretary's final assessment orders certainly must be considered as incorporating the federal mine inspectors' original violation notices, and the orders terminating them.[5] Like all other violation notices and orders issued under the regulations here in question, the inspectors' notices and orders not only contained findings describing the violations found,[6] but also contained express findings as to, in the words of Section 109(a)(1) of the Act, "whether the operator was negligent,"[7] "the gravity of the

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[5] Section 109(a)(4) refers only to a "decision *incorporating* findings of fact therein" [emphasis added]. 30 U.S.C. §819(a)(4).

[6] Thus, the findings that violations actually occurred were not "originally made by the Assessment Officer," 495 F.2d at 40n.10, but rather were made by trained mine safety experts based upon their own eyewitness observations at the actual times the violations occurred.

[7] Where violations are the result of the "unwarrantable failure" of an operator to comply with the Act, the required notices or orders are issued under Section 104(c) of the Act, 30 U.S.C. §814(c). If, as here, "unwarrantable failure" is not found, notices or orders are issued under other sections, which are also clearly noted.

violations,"[8] and "the demonstrated good faith of the operator . . . in attempting to achieve rapid compliance after notification of a violation."[9] Consequently, assuming that the Court of Appeals' interpretation of the statutory penalty provisions was correct, the only deficiency in the final assessment orders here was that they did not contain findings as to the respondents' history of previous violations, the appropriateness of the size of the penalties, and the effect of the penalties on the respondents' ability to continue in business. This deficiency could be remedied by ordering that the Assessment Officers supplement their orders by findings of fact as to these three criteria.

It should further be noted that the Assessment Officers would be the proper persons to make these supplemental findings. The petitioner in the companion case, the National Independent Coal Operators Association, has publicly claimed that the Court of Appeals' decision in this case requires not only that complete findings of fact accompany any final penalty assessment by the Secretary, but that such findings must be made by Administrative Law Judges and cannot be made by other representatives of the Secretary (*e.g.*, mine inspectors or assessment officers). See 39 Fed. Reg., 27559 (July 30, 1974). This assertion, of course, is farfetched and frivolous, although it will undoubtedly be raised in hundreds of district court cases if not firmly disposed of here. The statute refers only to findings of fact by "the Secretary" of the Interior, and mine inspectors and

[8] Where an inspector finds that a violation has created an "imminent danger," he issues a withdrawal order under §104(a) of the Act (30 U.S.C. §814(a)), which [order] states that an imminent danger has been found and indicates that the order is indeed a Section 104(a) order. If, as here, there is no imminent danger, notices or orders are issued under other sections, with the sections in question clearly indicated.

[9] The notices of violation all indicate a period of time allowed for achieving good faith compliance with the safety standards, while the termination notices indicate whether such compliance was achieved.

assessment officers clearly are representatives of the Secretary. Furthermore, the respondent here had a right to findings by a law judge under the regulations, and simply elected not to exercise it.

CONCLUSION

Amicus urges that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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